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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

MARVIN E. BARKIN
FRED W. POPE, JR.
TRENAM, SIMMONS, KEMKER, SCHARF & BARKIN
P. O. Box 1102
Tampa, Florida 33601

Attorneys for Petitioner,
ALDON KEITH KENTNER

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

The Petitioner, Aldon Keith Kentner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District, entered in this proceedng on June 6, 1973. References are to the Appendix included as a part of this Petition.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Second District, appears at 278 So.2d 637. (A. 1) The memorandum decision of the Florida Supreme Court denying petitioner's petiton for Writ of Certiorari on October 16, 1973, and denying petitioner's petition for rehearing on December 12, 1973, appears

at 285 So.2d 614. (A. 2) The final summary judgment of the Circuit Court of the Thirteenth Judicial Circuit of Florida is unreported and appended hereto (A. 3). The order of the Thirteenth Judicial Circuit granting respondent's motion to strike affidavit and stipulation concerning statements made during hearing on defendant's motion for summary judgment and denying plaintiff's motion for summary judgment and denying plaintiff's motion for rehearing is unreported and appended hereto (A. 5).

JURISDICTION

The judgment and opinion of the District Court of Appeal of Florida, Second District, was entered on June 6, 1973. A timely petition for Writ of Certiorari was filed with the Florida Supreme Court and was denied on October 16, 1973. A timely petition for rehearing was filed with the Florida Supreme Court and was denied on December 12, 1973. This petition for certiorari was filed within 90 days of the denial of the petition for rehearing by the Florida Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the rule announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), that a party releases only those he intends to release, permits a railroad that was neither named in nor a party to a release to utilize such release as a defense to an action brought under the Federal Employers' Liability Act, despite proffered evidence that the Railroad was not intended to be a beneficiary of the release.

2. Whether the rule announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), that the Parol Evidence Rule operates only as to the parties to a document, permits a railroad that is a stranger to a release, to invoke the Parol Evidence Rule to exclude evidence of the intent of the party giving the release in an action brought under the Federal Employers' Liability Act?

STATUTORY PROVISIONS INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. §§51, et. seq. The full text of the Act is appended hereto. (A. 6-9)

STATEMENT OF THE CASE

This case involves an action for personal injuries by the petitioner, Aldon Keith Kentner (hereinafter "Kentner"), against the Seaboard Coast Line Railroad Company and the Seacoast Transportation Company (hereinafter "Railroad") under the Federal Employers' Liability Act (hereinafter "FELA").

Petitioner was an employee of the Railroad and on November 30, 1967, during the course of that employment, he was called upon by the Railroad to assist in the loading of certain rugs at the warehouse of W. J. Smalley (hereinafter "Smalley"), in Tampa, Florida. The petitioner was injured while engaged in such work at the Smalley warehouse.

In 1969, petitioner filed a negligence action against Smalley and Smalley's insurance carrier, Royal Indemnity Company, for petitioner's injuries resulting from Smalley's negligence. On October 30, 1970, incident to

the settlement of that action, petitioner executed a *pre-printed release form,* a copy of which is appended hereto (A. 11). The pre-printed release was executed by the petitioner and was in favor of the Royal Globe Insurance Company, Smalley Transportation Company and W. J. Smalley, who were the defendants in that action. The $24,000.00 paid for the settlement of the Smalley case was paid by the defendants in the Smalley case and not by the Railroad, which was not a party to that case. *The railroad was not a party to the pre-printed release and was not named in the release.*

In 1970, petitioner filed a complaint against the Railroad and thereafter filed an amended complaint alleging that petitioner was injured as a result of the negligence of the Railroad in failing to provide him with a safe place to work or proper assistance or safeguards and that petitioner was entitled to recovery under the FELA. A copy of the amended complaint is appended hereto (A. 10).

The Railroad answered and set up certain defenses, including the Fifth Defense that the petitioner had filed a separate suit against Smalley, had settled that suit for the sum of $24,000.00 and released Smalley; and if any liability of Smalley were imputed to the Railroad, petitioner's action against the Railroad was barred by the release of Smalley. (A. 13-18) The Railroad thereafter filed a third-party complaint, and amendments thereto, against Smalley (A. 19-26) contending that Smalley's was the primary and active negligence, demanding indemnification, claiming that the Railroad had received an assignment from the petitioner of the monies which the Railroad had advanced for hospital and medical expenses and demanding judgment therefor. On January 10, 1972, the Railroad filed amendments

to its answer setting up as a Ninth Defense that its negligence, if any, was secondary or passive and that petitioner's release of his claim against Smalley barred petitioner's recovery against the Railroad. (A. 26-27)

The Railroad moved for summary judgment based only upon the pleadings and an admission by petitioner that the release he had executed in favor of Smalley and Royal Globe was genuine. No affidavits were attached to the Railroad's motion. The summary final judgment for the Railroad determined: (A. 3)

> [T]hat there is no genuine issue as to the material fact that, on or about October 30, 1970, and after the plaintiff's claim in this action accrued, the plaintiff released the defendants and all other persons, firms and corporations from it, by executing, acknowledging and delivering a written instrument entitled 'RELEASE OF ALL CLAIMS' in connection with the settlement of another suit pending in this Court, to wit, No. 179833, wherein Aldon Keith Kentner was plaintiff and W. J. Smalley, et al, were defendants.
>
> b. The defendants are entitled to a judgment as a matter of law in connection with the Fifth Defense and Ninth Defense set forth in the answer of defendants as amended, wherein the defendants have pleaded the said release as a bar to recovery in this action.

Petitioner then moved for a rehearing, pointing out that the court had failed to consider, "the intention of the parties to the release." The motion for rehearing, a copy of which is appended hereto (A. 28), specifically called the lower court's attention to this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), and the Fifth Circuit's decision in *Cates v. United States,*

451 F.2d 411 (5th Cir. 1972). The petitioner supported his motion by attaching an affidavit of his trial counsel as well as a stipulation between that counsel and counsel for the third-party defendants (A. 29 and 30). The affidavit of petitioner's counsel, Mr. Hapner, sets forth in material part that:

> [H]e was counsel for plaintiff herein in the former case of *Kentner v. Smalley et al,* . . . and that when the release plead by the defendant in the within cause, was executed by his client, it was his intention as well as that of his client as previously stated to counsel for defendant, W. J. SMALLEY, to file the within cause of action against the railroad defendant and that it was considered by counsel for plaintiff that the Florida Statutes clearly provided that the execution of the release would not release any claim against the railroad defendant and said advice was given to the plaintiff, herein, at that time.

The stipulation between petitioner's trial counsel and counsel for third-party defendant, Smalley, sets forth in material part: (A. 30)

> [T]hat during the hearing on the Motion for Summary Judgment filed in this cause by the Defendant/Third Party Complaint, Seaboard Coast Line Railroad Company, the attorney for the Plaintiff stated to the Trial Judge that it was not the intention of the Plaintiff to release his claim against the Railroad when the Release in issue was executed. Then, when the undersigned attorney for Smalley and Royal Globe was asked about his intention in obtaining the Release, the undersigned attorney stated that it was his intention to obtain a full Release in favor of his clients and he not know [sic] who all would be released through Mr. Kentner's execution of the Release in issue.

The Railroad moved to strike the affidavit and stipulation as, *inter alia,* attempts to "vary the terms and provisions of the written release" and because "all prior negotiations and agreements . . . were merged in the final release . . . ." (A. 31) The trial court's order of March 23, 1973, struck the affidavit and stipulation and denied the motion for rehearing. (A. 5)

On appeal of the adverse summary judgment ruling, petitioner presented the District Court of Appeal of Florida, Second District, with, *inter alia,* the following points of law:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, BASED ON A DEFENSE OF RELEASE, TO DEFENDANTS WHO HAD NOT SIGNED AND DID NOT DEMONSTRATE THAT THEY WERE INTENDED TO BE BENEFITED BY THAT RELEASE.
>
> • • •
>
> B. Under Federal Law, A Release Discharges Only Those Persons Intended By The Parties Thereto To Be Released.
>
> C. The Parol Evidence Rule Is Not Applicable.

On June 6, 1973, the Second District Court of Appeal filed its two-sentence per curiam affirmance, saying:

> One or two of the points raised on appeal at first gave us pause, but after having carefully considered those points and having meticulously reviewed the record herein we conclude that no reversible error has been made to appear. Accordingly, the judgment appealed from should be, and it is hereby, affirmed. (A. 1)

On the points of law raised on appeal, the Second District Court's two-sentence per curiam affirmance holds that under the federal law governing FELA actions the release in question discharged a *stranger* without a showing that the release was so intended; and that a stranger to a release in a FELA action may invoke the Parol Evidence Rule to prevent parties to a release from establishing the intent of the release.

The petitioner timely filed in the Florida Supreme Court a petition for a Writ of Certiorari to the District Court of Appeal on the grounds that the District Court of Appeal's decision conflicted with other Florida decisions requiring the application of federal law in FELA cases and conflicted with Florida decisions regarding the receipt of affidavit evidence on a motion for rehearing after grant of a final summary judgment. The Florida Supreme Court, in a 4-3 decision without opinion, denied the petition for Writ of Certiorari and thereafter denied the petition for rehearing. (A. 2)

REASONS FOR GRANTING THE WRIT

1. *The State Court Decision Below Is Contrary To The Humanitarian And Remedial Purposes Of The FELA And Is In Direct Conflict With This Court's Decision In* Zenith v. Hazeltine Research, Inc., *401 U.S. 321 (1971). The Decision Below Seriously Restricts A Plaintiff's Rights Under The FELA By Permitting A Stranger To Invoke The Protection Of A Release In Which The Stranger Is Neither Named, Nor To Which The Stranger Is A Party.*

This Court has consistently held that the FELA was enacted for remedial and humanitarian purposes, and is to be construed liberally to fulfill those purposes. *E.g., Urie v. Thompson,* 337 U.S. 163, 181-2 93 L.Ed. 1282, 1299 (1949), and *Jamison v. Encarnacion,* 281

U.S. 638, 640, 50 S.Ct. 440, 74 L.Ed. 1082, 1085 (1930). This Court has also observed that since the Congress enacted the FELA in broad, general terms, there was placed upon the courts "the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. . . . [I]t is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 2 L.Ed.2d 382, 388 (1958). In *Sinkler v. Missouri Pacific R. R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 2 L.Ed.2d 799, 802-03 (1958), this Court again stated some of the broad policy considerations governing FELA actions:

> [I]n interperting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, [citation omitted], was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. [citation omitted]. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. [citation omitted]. The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting 'the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden.' S Rep No. 460, 60th Cong, 1st Sess 3.

It is clear that the FELA's policy is to protect the comparatively helpless railroad employees when they are injured, and to permit such employees to proceed in their actions against railroads in a manner that is

relatively free of the hypertechnical quiddities of the common law.

The foregoing philosophy is well illustrated by the Court's decision in *Dice v. Akron, Canton & Youngstown R. R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), where the Court had before it a FELA case in which the validity of a release was a question. Pointing out the importance of releases in FELA litigation, and holding that in such cases the validity of a release is a *federal question,* the Court reasoned (342 U.S. at 361-62, 96 L.Ed. at 403):

> Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. [citation omitted]. *Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration.* [citation omitted]. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law. [emphasis added]

Second. In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. *Application of so harsh rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.* [emphasis added]

From this Court's decisions in *Urie, Jamison, Kernan, Sinkler,* and *Dice, supra,* construed with this Court's more recent decision in *Zenith v. Hazeltine, infra,* the following considerations emerge:

1. The policy implicit in the FELA is that a railroad will take precautions with regard to employee safety if there exists a statutory policy of liability.

2. Railroad employees, like seamen, are preferred statutory beneficiaries under federal law.

3. On its face it violates the Act to permit a railroad to get a free ride by being released without paying anything to its injured employee.

4. Since federal law says that a party releases only those he intends to release, *(Zenith v. Hazeltine, infra)* and since the policy of the FELA is one of protecting the comparatively helpless railroad employee, the intention of a release given under the FELA should be demonstrated in an iron-clad way, and if the railroad claiming the benefit of the release is not named in the release, the policy of the FELA demands that parol evidence be admitted to determine the intention of the railroad employee giving the release.

In the present case, the trial court and the District Court of Appeal applied the common law rule that a release of one joint tortfeasor was a release of all.[1]

[1] Ironically, Fla. Stat. §768.041(1), first enacted in 1957, abrogated the common law rule in Florida: "A release or covenant not to sue as to one tort-feasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tort-feasor who may be liable for the same tort or death." Thus, the Florida courts denied the petitioner the benefit of a rule which is in full effect in Florida as to state law claims and which should be in effect in Florida as to FELA claims.

These holdings are patently contrary to the federal doctrine set forth by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). Hazeltine contended that Zenith's release given to certain other companies (but not to Hazeltine) precluded an antitrust claim against Hazeltine. This Court rejected that contention and held that the effect of a release upon a tortfeasor not a party to the release is to be determined in accordance with the *intention of the parties to the release,* and that a party releases only those persons whom he intends to release. This Court specifically rejected the older rules that a release of one joint tortfeasor released all other parties jointly liable, or that a release without an express reservation of rights constituted a release of all tortfeasors and co-conspirators. The Court noted that although it had applied the common law rule in actions where rights arose under state or federal common law (401 U.S. at 344, 28 L.Ed.2d at 95),

> we are cited to no case where we have applied the rule to a statutory cause of action created under Federal law. Indeed, we have expressly repudiated the rule. See Arrow Mfg. Co. v. Convertible Top Co., 377 U.S. 476 501, 12 L.Ed.2d 457, 477, 84 S.Ct. 1526 (1964). Cf. Birdsell v. Shaliol, 112 U.S. 485, 489 L.Ed. 768, 769, 5 S.Ct. 244 (1884).

Discussing the rule ultimately adopted, the Court found (401 U.S. at 345, 28 L.Ed.2d at 96):

> A final rule, which has gained support in several recent decisions and been adopted by the American Law Institute in a tentative draft of the Second Restatement of Torts, provides that the effect of a release upon co-conspirators shall be determined in accordance with the intentions of the parties. See Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co. 232 F Supp 556, 561-563 (ND

Cal 1964), rev'd Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., supra; Young v. State, 455 P2d 889 (Alaska, 1969); Breen v. Peck, 28 NJ 351 146 A2d 665 (1958); Restatement (Second), Torts §885(1) (Tent. Draft No. 16, 1970); 12 Vand L Rev 1414, 1416-1417 (1959).

This Court also said (401 U.S. at 347, 28 L.Ed.2d at 97):

> To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys. *The straightforward rule is that a party releases only those other parties whom he intends to release.* Our conclusion that this is the appropriate rule for giving effect to releases under the antitrust laws is further buttressed by the Restatement's abandonment in a tentative draft of the rule requiring express reservation of rights in order to save them, and its adoption of the rule to which we adhere. See Restatement (Second), Torts §885, Comments a-d (Tent. Draft No. 16, 1970).
> [emphasis added]
>
> • • •
>
> We accordingly have no hesitancy in holding that HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not now entitled to the benefits of that release.

In rejecting the common law rule the Court expressly relied upon *Young v. State,* 455 P.2d 889 (Alaska 1969), in which the release contained language strikingly similar to the release executed by the petitioner herein. In *Young,* the document purported to release the named beneficiaries as well as "all other persons, corporations, firms, associations or partnerships . . . ." The present release (A. 11), in addition to releasing its named beneficiaries, purports to release "any other per-

son, firm or corporation charged or chargeable with responsibility or liability, their heirs, representatives and assigns . . . ." The Alaska court ruled that the effect of a release would be limited to those beneficiaries specifically named therein, and this Court expressly relied upon that decision in *Hazeltine.*

The *Hazeltine* decision was rendered in the context of an antitrust action; however, in a subsequent Fifth Circuit decision, *Cates v. United States,* 451 F.2d 411 (5th Cir. 1971), the court applied the *Hazeltine* rule to a seaman's personal personal injury claim against the United States. In *Cates,* Chief Judge Brown expressly recognized that the *Hazeltine* approach to the construction of releases was broadly applicable to claims of releases of rights arising under federal statutory and nonstatutory law. (451 F.2d at 415):

> While it is true that the [*Hazeltine*] Court was speaking immediately of statutory claims (patent and antitrust) *everything said points to a like approach in Federal question claims whose policies and traditions are as readily indentifiable.* [emphasis added]
>
> * * *
>
> Case law and *a complex of Federal legislation concerning employment, and working and safety conditions* reflect a commitment to the policy that allowance of money damages to those harmed by violations of these standards serves the dual purpose of (i) ameliorating the harm and (ii) encouraging other (by deterrence) to take effective preventive steps. For such cases, *the Hazeltine approach is most consistent with the aims and purposes of the damages remedy.* [emphasis added]

The protective policy of the FELA requires application of the *Hazeltine* and *Cates* rule that a release is effective only as intended by the parties to the release. The Florida trial court and District Court of Appeal chose to ignore the humanitarian underpinnings of the FELA, and ignored the *Hazeltine* and *Cates* holdings in permitting the Railroad, *which was a stranger to the pre-printed release, which made no contribution to the settlement, and which was not intended to be benefited by the release,* to set up the release as an absolute defense to the petitioner's FELA action. The Florida holdings completely defeated the federal rights guaranteed to petitioner by the FELA. Because releases in FELA cases are so important to the administration and liquidation of claims under the Act, and are so important to the achievement of the humanitarian and remedial purposes of the Act, the restrictive approach of the Florida courts should not be allowed to stand.

2. *The State Court Decision Below Is In Direct Conflict With This Court's Decision In* Zenith Radio Corp. v. Hazeltine Research, Inc., *401 U.S. 321 (1971), Because It Permits A Stranger To A Written Release In A FELA Case To Invoke The Parol Evidence Rule To Exclude Evidence Of The Intention Of The Parties To The Release As To The Effect Of The Release.*

The trial court struck petitioner's proffered evidence on the issue of the intent of the parties to the release, and cited the Parol Evidence Rule in support of its order. (A. 5-6). The Railroad invoked the Parol Evidence Rule even though the Railroad is neither named in, nor a party to, the release in question. This Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 277 (1971), is also dispositive of this issue. In Footnote 12, the Court expressly held (401 U.S. at 347, 28 L.Ed. at 97):

> Resort may be had to the contract in construing the release since *the parol evidence rule is usually understood to be operative only as to parties to a document, and HRI here was not a party to the release.* See Stern v. Commissioner, 137 F.2d 43, 46 (CA 2 1954); O'Shea v. New York, C. & St. L. R. Co., 105 F. 559, 562-563 (CA 7 1901); Restatement (Second), Torts §885, Comment d (Tent. Draft No. 16, 1970). See generally 9 J. Wigmore, Evidence §2446 (3d ed 1940). [emphasis added]

The Restatement's revised comment d to §885, upon which *Hazeltine* expressly relied, states:

> The agreement as to the effect of the release may be proved by external evidence; and *the objection of the parol evidence rule is met by the fact that the second tortfeasor who raises the question is not a party to the instrument.* [emphasis added]

Accordingly, the Second District Court's opinion sustaining the lower court's use of the Parol Evidence Rule to exclude evidence of the true intent of the parties to the release is in direct conflict with this Court's decision in *Zenith v. Hazeltine, supra,* and the vast majority of jurisdictions which have considered the point. *See generally,* Annotation, *Applicability Of Parol Evidence Rule In Favor Of Or Against One Not A Party To Contract Of Release,* 13 A.L.R.3d 313 (1967).[2]

Permitting the Railroad, which was not named in, nor a party to, the release in question, to invoke the Parol Evidence Rule to bar evidence of the intent of the

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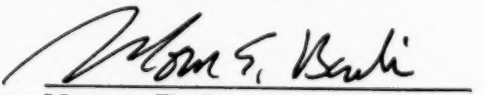
[2] Another point of irony is that in Florida it is equally well settled that only the parties to a contract, or their privies, may invoke the Parol Evidence Rule. A stranger to the instrument cannot. *Roof v. Chattanooga Woodsplit Pulley Co.,* 36 Fla. 284, 18 So. 587 (1895); *Palmer v. R.S. Evans, Jacksonville, Inc.,* 81 So.2d 635 (Fla. 1955); *Bessemer Properties v. Barber,* 105 So.2d 895 (2d D.C.A. Fla. 1958).

parties to the release destroyed the petitioner's rights under the FELA, is in conflict with *Hazeltine, supra,* and conflicts with most jurisdictions that have considered the point. The Florida decision is contrary to the spirit of FELA, and cases construing it, and cannot be permitted to stand.

CONCLUSION

The decision of the trial court, as sustained by the District Court of Appeal of Florida, Second District, is impermissibly restrictive of the rights guaranteed to the petitioner by the FELA and this Court's prior decisions construing the Act. Because of the importance of releases in the administration of the Act, and the flagrant conflict with this Court's *Hazeltine* decision, a Writ of Certiorari should issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District.

Respectfully submitted,



MARVIN E. BARKIN
FRED W. POPE, JR.
TRENAM, SIMMONS, KEMKER,
SCHARF & BARKIN
P. O. Box 1102
Tampa, Florida 33601

Aldon Keith KENTNER, Appellant,

v.

SEABOARD COAST LINE RAILROAD COMPANY and The Seacoast Transportation Company, Appellees.

No. 72-296.

District Court of Appeal of Florida,

June 6, 1973.

Appeal from Circuit Court, Hillsborough County; Jas. D. Bruton, Jr., Judge.

William R. Hapner, Jr., of Rood & Hapner, Tampa, and Marvin E. Barkin of Trenam, Simmons, Kemker, Scharf & Barkin, Tampa, for appellant.

William A. Gillen of Fowler, White, Gillen, Humkey, Kinney & Boggs, Tampa, for appellees.

PER CURIAM.

One or two of the points raised on appeal at first gave us pause, but after having carefully considered those points and having meticulously reviewed the record herein we conclude that no reversible error has been made to appear. Accordingly, the judgment and sentence [sic] appealed from should be, and they are hereby, affirmed.

MANN, C. J., and LILES and McNULTY, JJ., concur.

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Aldon Keith KENTNER, Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY and the Seacoast Transportation Company, Respondents.

No. 44038.

Supreme Court of Florida.

Oct. 16, 1973.

Rehearing Denied Dec. 12, 1973.

Certiorari denied. 278 So.2d 637.

CARLTON, C. J., and ROBERTS, BOYD and DEKLE, JJ., concur.

ERVIN, ADKINS and McCAIN, JJ., dissent.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

ALDON KEITH KENTNER,

Plaintiff,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, and THE SEACOAST TRANSPORTATION COMPANY, a foreign corporation,

Defendants and Third Party Plaintiffs,

vs.

W. J. SMALLEY, doing business as SMALLEY TRANSPORTATION COMPANY, SMALLEY INVESTMENTS, INC., a corporation, and ROYAL INDEMNITY COMPANY, a corporation,

Third Party Defendants.

Case No. 192187

Division C

SUMMARY FINAL JUDGMENT FOR DEFENDANTS

This cause came on to be heard, after due notice, upon the motion of the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, for a summary judgment against the plaintiff, Aldon Keith Kentner, and, having considered the legal authorities cited by, and the arguments of, counsel for the respective parties, the Court finds:

a. The pleadings, depositions and admissions on file show that there is no genuine issue as to the material fact that, on or about October 30, 1970, and after the plaintiff's claim in this action accrued, the plaintiff released the defendants and all other persons, firms and corporations from it, by executing, acknowledging and delivering a written instrument entitled "RELEASE OF ALL CLAIMS" in connection with the settlement of another suit then pending in this Court, to wit, No. 179833, wherein Aldon Keith Kentner was plaintiff and W. J. Smalley, et al, were defendants.

b. The defendants are entitled to a judgment as a matter of law in connection with the Fifth Defense and Ninth Defense set forth in the Answer of Defendants, as amended, wherein the defendants have pleaded the said release as a bar to recovery in this action.

IT, THEREFORE, IS ADJUDGED as follows:

1. That the Defendants' Motion for Summary Judgment Against Plaintiff be and the same hereby is granted.

2. That the plaintiff, Aldon Keith Kentner, take nothing by this action and that the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, go hence without day.

ORDERED at Tampa, Florida, this 28 day of February, 1972.

/s/ JAMES D. BRUTON, JR.
Circuit Judge

Copies furnished to:

William R. Hapner, Jr., Esq.
F. Ronald Fraley, Esq.
William A. Gillen, Esq.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION

ALDON KEITH KENTNER,

Plaintiff,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, and THE SEACOAST TRANSPORTATION COMPANY, a foreign corporation,

Defendants and Third Party Plaintiffs,

vs.

W. J. SMALLEY, doing business as SMALLEY TRANSPORTATION COMPANY, SMALLEY INVESTMENTS, INC., a corporation, and ROYAL INDEMNITY COMPANY, a corporation,

Third Party Defendants.

Case No. 192187

Division C

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND STIPULATION CONCERNING STATEMENTS MADE DURING HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR REHEARING

This cause came on to be heard, after due notice, upon the motion of the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, to strike the affidavit of William R. Hapner, Jr., dated March 6, 1972, and the stipulation concerning statements made during hearing on defendants' Motion for Summary Judgment

referred to in the plaintiff's Motion for Rehearing, and upon the plaintiff's Motion for Rehearing, and was argued by counsel for the plaintiff and defendants, and thereafter, the court being fully advised in the premises, it is

ORDERED and ADJUDGED as follows:

1. That the Defendants' Motion to Strike Affidavit and Stipulation Concerning Statements made During Hearing on Defendants' Motion for Summary Judgment be and the same hereby is granted, and that the Affidavit of William R. Hapner, Jr., dated March 6, 1972, and the said Stipulation be and the same hereby are stricken.

2. That the motion of the plaintiff, Aldon Keith Kentner, for rehearing of the Summary Final Judgment for Defendants be and the same hereby is denied.

DONE and ORDERED at Tampa, Florida, this 23 day of March, 1972.

/s/ JAMES D. BRUTON, JR.
Circuit Judge

Copies furnished to:

William R. Hapner, Jr., Esq.
F. Ronald Fraley, Esq.
William A. Gillen, Esq.

THE FEDERAL EMPLOYER'S LIABILITY ACT, 28 U.S.C. §§51-59.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any per-

son suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off

therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none,

then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only the recovery for the same injury.

AMENDED COMPLAINT

Now comes the plaintiff, ALDON KEITH KENTNER, and sues the defendants, SEABOARD COAST LINE RAILROAD COMPANY, and THE SEACOAST TRANSPORTATION COMPANY, foreign corporations, and alleges:

1. That the plaintiff, ALDON KEITH KENTNER, is a citizen and resident of Tampa, Hillsborough County, Florida, and defendants are foreign corporations with a principal place of business in Jacksonville and doing business in Hillsborough County, Florida.

2. That this is a civil action arising under Section 51-60, Title 45, U.S.C.

3. At all times material to this cause of action, the plaintiff, ALDON KEITH KENTNER, was an employee of the Seaboard Coast Line Railroad Company and its subsidiary, The Seacoast Transportation Company, doing business in Hillsborough County, Florida.

4. At all times material to this cause of action, the plaintiff was an employee of the defendant railroad and was working at his regular employment in furtherance of interstate commerce.

5. At on or about November 30, 1967, the plaintiff, ALDON KEITH KENTNER, pursuant to his employment by Seacoast Transportation Company, was called upon to assist in the loading of certain large rugs at the warehouse of W. J. Smalley on Westshore Boulevard, Tampa, Hillsborough County, Florida, which large rugs varied in weight from 200 to 800 pounds.

6. That on said date and at said place, the plaintiff, while attempting to unload said rugs, without assistance, was suddenly caused to fall and the rug was pushed against his right leg, causing him to be twisted and twisting his body around, causing him to fall in the trailer of the truck which he was loading.

This Indenture Witnesseth that, in consideration of the sum of TWENTY-FOUR THOUSAND NINE HUNDRED AND NO/100 ~~EIGHTY-FIVE THOUSAND~~ Dollars ($ ~~85,000.00~~ 24,000.00), receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge ROYAL GLOBE INSURANCE COMPANY, SMALLEY TRANSPORTATION COMPANY and W. J. SMALLEY and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs representatives and assigns from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, loss or damages of any kind already sustained or that I may hereafter sustain in consequence of an accident that occurred on or about the 30th day of November 19 67, at ~~XXXX~~ warehouse occupied by W.J. Smalley, located on West Shore Blvd., Tampa, Florida.

To procure payment of the said sum, I hereby declare: that I am more than _____ years of age; that no representations about the nature and extent of said injuries, disabilities or damages made by any physician, attorney or agent of any party hereby released, nor any representations regarding the nature and extent of legal liability or financial responsibility of any of the parties hereby released, have induced me to make this settlement; that in determining said sum there has been taken into consideration not only the ascertained injuries, disabilities and damages but also the possibility that the injuries sustained may be permanent and progressive and recovery therefrom uncertain and indefinite, so that consequences not now anticipated may result from the said accident.

I hereby agree that, as a further consideration and inducement [illegible]

This Indenture Witnesseth that, in consideration of the sum of TWENTY-FOUR THOUSAND NINE THOUSAND TWO HUNDRED AND NO/100 DOLLARS ($24,000.00), receipt whereof is hereby acknowledged, for myself and for my heirs, personal representatives and assigns, I do hereby release and forever discharge ROYAL GLOBE INSURANCE COMPANY, SMALLEY TRANSPORTATION COMPANY and W. J. SMALLEY and any other person, firm or corporation charged or chargeable with responsibility or liability, their heirs representatives and assigns from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, loss or damages of any kind already sustained or that I may hereafter sustain in consequence of an accident that occurred on or about the 30th day of November 19 67, at warehouse occupied by W.J. Smalley, located on West Shore Blvd., Tampa, Florida.

To procure payment of the said sum, I hereby declare: that I am more than _____ years of age; that no representations about the nature and extent of said injuries, disabilities or damages made by any physician, attorney or agent of any party hereby released, nor any representations regarding the nature and extent of legal liability or financial responsibility of any of the parties hereby released, have induced me to make this settlement; that in determining said sum there has been taken into consideration not only the ascertained injuries, disabilities and damages but also the possibility that the injuries sustained may be permanent and progressive and recovery therefrom uncertain and indefinite, so that consequences not now anticipated may result from the said accident.

I hereby agree that, as a further consideration and inducement for this compromise settlement, this settlement shall apply to all unknown and unanticipated injuries and damages resulting from said accident, casualty or event, as well as to those now disclosed.

I understand that the parties hereby released admit no liability of any sort by reason of said accident and that said payment and settlement in compromise is made to terminate further controversy respecting all claims for damages that I have heretofore asserted or that I or my personal representative might hereafter assert because of the said accident.

Signed and sealed this 31st day of October, 19 70
(CAUTION-READ BEFORE SIGNING)

Witnessed by

Aldon Keith Kentner (SEAL)
Aldon Keith Kentner

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH } SS

On this 31st day of October 19 70 before me personally appeared ALDON KEITH KENTNER to me known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

My Commission expires _____
Notary Public, State of Florida at Large
My Commission Expires Jan. 23, 1971

7. The said fall and injury resulting therefrom as hereinafter described was caused by the negligence of the defendants in failing to provide the plaintiff with a safe place to work; in instructing the plaintiff to work in an unsafe place; in failing and neglecting to provide plaintiff with proper assistance with which to do his work, although it knew that the work that it had instructed plaintiff to perform required assistance; and in failing to safeguard plaintiff against injury in the performance of that work.

8. As a direct and proximate result of the aforesaid negligence of the defendants in whole or in part, the plaintiff, ALDON KEITH KENTNER, was painfully and permanently injured in and about his head, neck, body, limbs and nervous system; and he has suffered and will in the future suffer mental and physical pain and anguish, humiliation and embarrassment; he lost income from his job; he suffered a physical handicap and disability in connection with his usual activities and recreations, and will continue to suffer such handicap and disability in the future; and his ability to enjoy a normal life and his earning capacity have been permanently impaired. He has had to spend money for hospitalization, medicines and medical treatment because of the accident, and for travel necessary to secure such medical attention, and in the future will be compelled to incur similar expense for such medical care and travel to secure same.

WHEREFORE, the plaintiff, ALDON KEITH KENTNER, sues the defendants, SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY, foreign corporations, and claims damages of and from the defendants in excess of $1,500.00, exclusive of costs, and requests a trial by jury.

WILLIAM R. HAPNER, JR.
Rood and Hapner
200 Pierce Street

Tampa, Florida 33602
ATTORNEYS FOR PLAINTIFF

ANSWER OF DEFENDANTS

The defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, jointly and severally, by their undersigned attorneys, for answer to the amended complaint of the plaintiff, Aldon Keith Kentner, say:

FIRST DEFENSE

For their first defense to the plaintiff's amended complaint, the defendants allege that the said amended complaint fails to state a cause of action against the defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

For their second defense to the plaintiff's amended complaint, the defendants say:

1. The defendants admit the allegations of paragraph 1 of the plaintiff's amended complaint.

2. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the plaintiff's amended complaint.

3. In answering paragraph 3 of the plaintiff's amended complaint, the defendants admit that, at all times material to this cause of action, the plaintiff, Aldon Keith Kentner, was an employee of the Seaboard Coast Line Railroad Company, doing business in Hillsborough County, Florida, but the defendants deny that the said plaintiff was an employee of The Seacoast Transportation Company.

4. Answering paragraph 4 of the plaintiff's amended complaint, the defendants admit that, at all times material to this cause of action, the plaintiff was an employee of the defendant railroad company, but the defendants deny each and all of the other allegations of the said paragraph.

5. The defendants deny the allegations of paragraph 5 of the plaintiff's amended complaint.

6. The defendants deny the allegations of paragraph 6 of the said complaint.

7. The defendants deny the allegations of paragraph 7 of the plaintiff's amended complaint.

8. The defendants deny the allegations of paragraph 8 of the plaintiff's amended complaint.

THIRD DEFENSE

For their Third Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. On or about November 30, 1967, while acting within the scope of his employment by the defendant, Seaboard Coast Line Railroad Company, the plaintiff drove a certain tractor-trailer to a warehouse occupied and operated by W. J. Smalley, doing business as Smalley Transportation Company, hereinafter referred to as "SMALLEY," on Westshore Boulevard, south of Buffalo Avenue, in Tampa, Florida, where the said trailer was to be loaded with certain rolled rugs or carpeting by the said SMALLEY, by his agents or employees.

3. The said SMALLEY, by his agents or employees, loaded one tier of rolled rugs or carpeting in the said trailer and was in the process of loading a second tier thereof into said trailer. At said time and place, and at the request of the said SMALLEY, by his agents or employees, the plaintiff voluntarily attempted to assist one or more agents or employees of the said SMALLEY in loading the said trailer. While so engaged, the plaintiff negligently was injured by the said SMALLEY, his agents or employees, as alleged in paragraph 4

and 5 of the complaint filed, July 15, 1969, in Suit No. 179833, in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, wherein the plaintiff herein, Aldon Keith Kentner, was plaintiff and Royal Globe Insurance Company and W. J. Smalley, doing business as Smalley Transportation Company, were defendants, a copy of which complaint is attached hereto marked Exhibit A and is made a part hereof by special reference as if set forth in haec verba, and such negligence of SMALLEY, his agents or employees, was a proximate cause of any injury suffered by the plaintiff.

4. The plaintiff was injured by the negligence of the said SMALLEY, his agents or employees, in the manner in which the said SMALLEY, his agents or employees, loaded or attempted to load the said rugs or carpeting from SMALLEY's warehouse into the said trailer.

5. The plaintiff herein was not injured as a result of the negligent failure of the defendants herein, or either of them, to furnish him a reasonably safe place in which to work.

6. The said SMALLEY and his agents or employees were not officers, agents or employees of the defendants herein, or either of them, and the alleged injury to the plaintiff did not result in whole or in part from the negligence of any of the officers, agents, or employees of either defendant herein, or by reason of any defect of insufficiency, due to the negligence of either defendant herein, in their respective cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

FOURTH DEFENSE

For their Fourth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of

paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2 and 3 of their Third Defense to the plaintiff's amended complaint.

3. The plaintiff heretofore compromised and settled his aforesaid suit against Royal Globe Insurance Company and SMALLEY for the sum of Twenty-four Thousand Dollars ($24,000.00), and said sum was delivered to or on behalf of the plaintiff by or on behalf of the said SMALLEY in full satisfaction of plaintiff's claim in said Suite No. 179833.

4. The said SMALLEY and his agents or employees were not officers, agents or employees of either defendant herein.

5. Neither of the defendants owned, controlled or operated the premises where the alleged injury suffered by the plaintiff occurred or any equipment being used by the said SMALLEY, his agents or employees, at the time of such injury. Such premises and equipment were solely owned, controlled or operated by the said SMALLEY, his agents or employees, and the method of loading the said rugs or carpeting was solely selected and determined by the said SMALLEY, his agents or employees.

6. The aforesaid negligence of the said SMALLEY, his agents and employees, was primary or active.

7. If the aforementioned negligence of SMALLEY, his agents or employees, was imputed to the defendants herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence, and the aforesaid accord and satisfaction of the plaintiff's claim against SMALLEY bars any recovery herein by the plaintiff against the defendants, or either of them.

FIFTH DEFENSE

For their Fifth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2 and 3 of their Third Defense to the plaintiff's amended complaint.

3. The plaintiff heretofore compromised and settled his aforesaid suit against Royal Globe Insurance Company and SMALLEY for the sum of Twenty-four Thousand Dollars ($24,000.00), and heretofore, after plaintiff's claim in Suit No. 179833 accured, the plaintiff released SMALLEY from it.

4. The defendants adopt by reference and reallege as it set forth herein in haec verba the allegations of paragraphs 4, 5 and 6 of their Fourth Defense to the plaintiff's amended complaint.

5. If the aforementioned negligence of SMALLEY, his agents or employees, was imputed to the defendants herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence, and the aforesaid release of the plaintiff's claim against SMALLEY bars any recovery herein by the plaintiff against the defendants, or either of them.

SIXTH DEFENSE

For their Sixth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2 and 3 of their Third Defense to the plaintiff's amended complaint.

3. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 3 and 4 of their Fifth Defense to the plaintiff's amended complaint.

4. If the aforementioned negligence of SMALLEY, his agents or employees, was imputed to the defendants herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence, and the defendants are entitled to have the court set off the aforementioned sum of Twenty-four Thousand Dollars ($24,000.00) heretofore paid by or on behalf of SMALLEY to or for the plaintiff from the amount of any judgment which the plaintiff may recover herein against the defendants, or either of them.

SEVENTH DEFENSE

For their Seventh Defense to the plaintiff's amended complaint, the defendants say that, at the time and place alleged in the plaintiff's amended complaint, the plaintiff's negligence contributed to the accident and his injury and damages because he negligently permitted a fork lift being used and operated by W. J. Smalley, doing business as Smalley Transportation Company, hereinafter referred to as "SMALLEY," by his agents or employees, to push a roll of rugs or carpeting against him while the plaintiff was engaged in loading or assisting in loading the said rugs or carpeting from SMALLEY's warehouse into the trailer of a tractor-trailer which the plaintiff was employed to operate for the defendant, Seaboard Coast Line Railroad Company.

FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438
Tampa, Florida 33601
By: William A. Gillen
WILLIAM A. GILLEN
Attorneys for defendants

THIRD-PARTY COMPLAINT

The defendants-third-party plaintiffs, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, jointly and severally sue the third-party defendants, W. J. Smalley, doing business as Smalley Transportation Company, Smalley Investments, Inc., a corporation, and Royal Indemnity Company, a corporation, and allege:

First Cause of Action

1. The plaintiff, Aldon Keith Kentner, has filed against the defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, an amended complaint, a copy of which is hereto attached marked "Exhibit A", and which amended complaint is made a part hereof by special reference as if set forth herein in haec verba.

2. On or about November 30, 1967, while acting within the scope of his employment by the defendant-third-party plaintiff, Seaboard Coast Line Railroad Company, the plaintiff drove a certain tractor-trailer to a warehouse occupied and operated by the third-party defendants, W. J. Smalley, doing business as Smalley Transportation Company, hereinafter referred to as "SMALLEY," and/or Smalley Investments, Inc., on Westshore Boulevard, south of Buffalo Avenue, in Tampa, Florida, where the said trailer was to be loaded with certain rolled rugs or carpeting by the said SMALLEY and/or Smalley Investments, Inc., by their respective agents or employees.

3. Said SMALLEY and/or Smalley Investments, Inc., by their respective agents or employees, loaded one tier of rolled rugs or carpeting in the said trailer and was in the process of loading a second tier thereof into said trailer. At said time and place, at the request of the said SMALLEY and/or Smalley Investments, Inc., by their respective agents or employees, the plaintiff voluntarily attempted to assist one or more agents or

employees of the said SMALLEY and/or Smalley Investments, Inc. in loading the said trailer. While so engaged, the plaintiff negligently was injured by the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, as alleged in paragraphs 4 and 5 of the complaint filed, July 15, 1969, in Suit No. 179833, in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, wherein the plaintiff herein, Aldon Keith Kentner, was plaintiff, and Royal Globe Insurance Company and W. J. Smalley, doing business as Smalley Transportation Company, were defendants, a copy of which complaint is attached hereto marked "Exhibit B" and is made a part hereof by special reference as if set forth herein in haec verba, and such negligence of SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees was a proximate cause of any injury suffered by the plaintiff.

4. The plaintiff was injured by the negligence of the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, in the manner in which the said rugs or carpeting were loaded or attempted to be loaded from said warehouse into the said trailer.

5. Neither the said SMALLEY nor Smalley Investments, Inc., or their respective agents or employees were officers, agents or employees of either of the defendants-third-party plaintiffs herein.

6. Neither of the defendants-third-party plaintiffs, owned, controlled, or operated the premises where the alleged injuries suffered by the plaintiff occurred or any equipment being used by the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, at the time of such injury. Such premises and equipment were solely owned, controlled or operated by the said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees, and the method of loading the said rugs or carpeting was solely selected and determined by the

said SMALLEY, his agents or employees, and/or Smalley Investments, Inc., its agents or employees.

7. The aforesaid negligence of SMALLEY and/or Smalley Investments, Inc., was primary or active.

8. If the aforementioned negligence of SMALLEY, his agents or employees, and/or Smalley Investments, Inc. was imputed to the defendants and third-party plaintiffs herein, or either of them, by reason of the relationship of employer and employee between them, or either of them, and the plaintiff, then any liability of the defendants and third-party plaintiffs, or either of them, to the plaintiff was a result of vicarious, imputed, secondary or passive negligence.

9. The defendants and third-party plaintiffs are informed and believed and therefore aver that the third-party defendant, Royal Indemnity Company, a corporation, was the insurer of the said SMALLEY and/or Smalley Investments, Inc. under a liability policy applicable to the event and injuries to the plaintiff hereinbefore described.

WHEREFORE, the third-party plaintiffs, jointly and severally, demand judgment against the third-party defendants, W. J. Smalley, doing business as Smalley Transportation Company, Smalley Investments, Inc., a corporation, and Royal Indemnity Company, a corporation, for all sums that may be adjudged against the defendants and third-party plaintiffs in favor of the plaintiff, Aldon Keith Kentner.

Second Cause of Action

1. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 1 through 9 of their First Cause of Action hereinbefore set forth.

2. After the plaintiff's claim and cause of action alleged in Suit No. 179833 against SMALLEY and Royal

Globe Insurance Company (in truth Royal Indemnity Company) had accrued, the plaintiff and SMALLEY and Royal Indemnity Company agreed upon a compromise and settlement of that suit for the sum of $24,000.00 to be paid to the plaintiff by SMALLEY and/or Royal Indemnity Company.

3. Out of the proceeds of the said sum of $24,000.00 agreed to be paid by SMALLEY and Royal Indemnity Company to the plaintiff, the defendant and third-party plaintiff, Seaboard Coast Line Railroad Company, was entitled to receive the sum of $12,455.81 representing sums advanced by it to or on behalf of the plaintiff for hospital, doctors', ambulance, medicines and other expenses in connection with the plaintiff's injuries. The plaintiff assigned and transferred to the defendant and third-party plaintiff, Seaboard Coast Line Railroad Company, his claim against W. J. Smalley, doing business as Smalley Transportation Company, to the extent of $12,455.81, less the sum of $3,835.65 (representing an attorneys' fee for the plaintiff's attorney of 30% of the said sum of $12,455.81 for negotiating settlement of and collecting the same, plus one-half of the plaintiff's court and other costs in the amount of $197.82 incurred in the suit against SMALLEY and his said insurer) leaving a balance of $8,620.16 due to be paid by SMALLEY and/or Royal Indemnity Company to Seaboard Coast Line Railroad Company.

4. The third-party plaintiffs are informed and believe and therefore aver that, out of the sum of $24,000.00 agreed to be paid to the plaintiff in settlement of the aforementioned Suit No. 179833, SMALLEY and Royal Indemnity have paid to the plaintiff the sum of $15,379.84, but have failed and refused to pay to Seaboard Coast Line Railroad Company or to the plaintiff, for the use and benefit of Seaboard Coast Line Railroad Company, the aforesaid sum of $8,620.16.

WHEREFORE, the third-party plaintiffs, demand judgment in favor of Seaboard Coast Line Railroad Company against the third-party defendants, W. J.

Smalley, doing business as Smalley Transportation Company, Smalley Investments, Inc., a corporation, and Royal Indemnity Company, a corporation, for the sum of $8,620.16, together with interest and court costs.

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438, Tampa, Florida 33601

By: William A. Gillen

Attorneys for Third-Party Plaintiffs

AMENDMENTS TO THIRD PARTY COMPLAINT

The defendants-third-party plaintiffs, Seaboard Coast Line Railroad Company, a corporation and The Seacoast Transportation Company, a corporation, jointly and severally, before a responsive pleading has been served to the third-party complaint heretofore filed herein by them, hereby amend the said third-party complaint in the following particulars and manner:

1. The defendants and third party complainants hereby amend the First Cause of Action contained in their third-party complaint by adding thereto a paragraph 10 in words and figures as follows:

> "10. The defendants and third-party plaintiffs were compelled to employ and did employ counsel, to wit, the law firm of Fowler, White, Gillen, Humkey, Kinney & Boggs, P.A., First Federal Building, Tampa, Florida, and to incur costs and expenses in defending the action filed against them by the plaintiff and in prosecuting this third-party complaint against the third-party defendants, and are entitled to recover from the third-party defendants the reasonable value of the services of the said attorneys so employed by them and to recover the court costs and expenses incurred herein by them."

2. The defendants and third-party plaintiffs hereby amend the demand for judgment for relief contained in said First Cause of Action of their third-party complaint to read as follows:

> "WHEREFORE, the third-party plaintiffs, jointly and severally, demand judgment against the third-party defendants (1) for all sums that may be adjudged against the defendants and third-party plaintiffs in favor of the plaintiff, Aldon Keith Kentner, (2) for the reasonable value of the services rendered by the attorneys employed by the defendants and third-party plaintiffs herein, and (3) for their costs incurred herein."

3. The defendants and third-party plaintiffs hereby amend the Second Cause of Action contained in their third party complaint in the following respects:

> A. By deleting the paragraph at the end of the first sentence in paragraph 3 thereof, by substituting a comma in place of said period and by adding the following words at the end of said sentence: "pursuant to the provisions of a written assignment executed by the plaintiff, a copy of which is attached hereto marked "Exhibit C."
>
> B. By adding at the end of paragraph 3 thereof a new sentence in words and figures as follows: "The last mentioned assignment and transfer was oral, but an oral notice thereof was furnished by William R. Hapner, Jr., Esq., as counsel for the plaintiff, to F. Ronald Fraley, Esq., as counsel for SMALLEY and Royal Indemnity Company, on or about 1/25/71, and was confirmed by a letter, dated January 25, 1971, a copy of which is hereto attached marked "Exhibit D."

4. The defendants and third-party plaintiffs hereby amend their third-party complaint by adding thereto a Third Cause of Action in words and figures as follows:

"Third Cause of Action

1. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 1 through 7 of their First Cause of Action, as amended.

2. If the defendants and third-party plaintiffs were guilty of negligence which was a proximate cause of damage to the plaintiff, as alleged in the plaintiff's amended complaint, a copy of which is attached hereto marked "Exhibit A", such negligence on their part was secondary or passive negligence, and, if the defendants are held liable to the plaintiff for such negligence, then the defendants and third-party plaintiffs are entitled to indemnity from SMALLEY and/or Smalley Investments, Inc., for such liability, because the said SMALLEY and/or Smalley Investments, Inc., were guilty of primary or active negligence which was a proximate cause of the plaintiff's said damages.

3. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 9 and 10 of their First Cause of Action, as amended.

WHEREFORE, the third-party plaintiffs, jointly and severally, demand judgment against the third-party defendants (1) for all sums that may be adjudged against the defendants and third-party plaintiffs in favor of the plaintiff, Aldon Keith Kentner, (2) for the reasonable value of the services rendered by the attorneys employed by the defendants and third-party plaintiffs herein, and (3) for their costs incurred herein."

5. The defendants and third-party plaintiffs hereby amend their third-party complaint by adding thereto a Fourth Cause of Action in words and figures as follows:

"Fourth Cause of Action

1. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 1 through 7 of their First Cause of Action, as amended.

2. The third-party plaintiffs hereby reallege and adopt by reference the allegations of paragraphs 2, 3 and 4 of their Second Cause of Action, as amended.

WHEREFORE, the third-party plaintiffs demand judgment against the third-party defendants for the sum of $8,620.16, together with interest and court costs."

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438, Tampa Florida 33601

By: William A. Gillen

Attorneys for Defendants and Third-Party Defendants

AMENDMENTS TO ANSWER OF DEFENDANTS

The defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, jointly and severally, by their undersigned attorneys, hereby amend the Answer of Defendants as follows:

1. The defendants hereby add to their answer an Eighth Defense in words and figures as follows:

"EIGHTH DEFENSE

For their Eighth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the alle-

gations of paragraphs 1 through 8 of their Second Defense to the plaintiff's amended complaint.

2. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 2, 3 and 4 of their Third Defense to the plaintiff's amended complaint.

3. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 3, 4, 5 and 6 of the Fourth Defense to the plaintiff's amended complaint.

4. If the defendants were guilty of any alleged negligence which was a proximate cause of damage to the plaintiff, such negligence on the part of the defendants was secondary and passive negligence, and the aforesaid accord and satisfaction of the plaintiff's claim against SMALLEY, who was guilty of primary or active negligence, bars any recovery herein by the plaintiff against the defendants, or either of them."

2. The defendants hereby amend the answer of defendants by adding thereto a Ninth Defense in words and figures as follows:

"NINTH DEFENSE

For their Ninth Defense to the plaintiff's amended complaint, the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1, 2, 3 and 4 of their Fifth Defense to the plaintiff's amended complaint.

2. If the defendants were guilty of any alleged negligence which was a proximate cause of any damage to the plaintiff, such negligence was secondary or passive negligence, and the aforesaid release by the plaintiff of his claim against

SMALLEY bars any recovery herein by the plaintiff against the defendants, or either of them.

3. The defendants hereby amend their answer by adding thereto a Tenth Defense in words and figures as follows:

"TENTH DEFENSE

For their Tenth Defense to the plaintiff's amended complaint the defendants say:

1. The defendants adopt by reference and reallege as if set forth herein in haec verba the allegations of paragraphs 1, 2, 3 and 4 of their Fifth Defense to the plaintiff's amended complaint.

2. If the defendants were guilty of any alleged negligence which was a proximate cause of any damage to the plaintiff, such negligence was secondary or passive negligence, and the defendants are entitled to have the court set off the aforementioned sum of $24,000.00 heretofore paid by or on behalf of SMALLEY to or for the plaintiff from the amount of any judgment which the plaintiff may recover herein against the defendants, or either of them.

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438, Tampa, Florida 33601

By: William A. Gillen

Attorneys for Defendants

MOTION FOR REHEARING

Now comes the plaintiff and moves the Court for a rehearing of its Summary Judgment against plaintiff entered herein pursuant to Rule 1.530(a) of the Florida Rules of Civil Procedure, and as grounds therefore, says,

1. The Court erred in failing to consider the intention of the parties to the release plead by defendant

as required by the United States Supreme Court decision in *Zenith Radio Corporation v. Hazeltine Research,* 41 US 321, 91 Supreme Court 795 (1971) and followed by [sic] the Fifth Circuit Court of Appeals in *Cates v. United States,* 451 Fed 2d 411, (1972). Evidence of the fact that the parties to the release did not intend to release the Railroad is submitted by the affidavit of counsel for plaintiff attached hereto, and the stipulation of counsel for the parties to the release in regard to their statements at the previous hearing for the Motion for Summary Judgment herein also attached hereto.

2. The Court erred in applying Federal Law to the issues raised by defendant in regard to the release when the said release was executed and delivered in accordance with Florida Law and specifically Florida Statute Section 768.041.

WILLIAM R. HAPNER, JR.
Rood and Hapner
200 Pierce Street
Tampa, Florida 33602

ATTORNEYS FOR PLAINTIFF

A F F I D A V I T

WILLIAM R. HAPNER, JR., being first duly sworn, deposes and says that he was counsel for plaintiff herein in the former case of *Kentner v. Smalley, et al,* No. 179833, on the docket of this Court and that when the release plead by the defendant in the within cause was executed by his client, it was his intention as well as that of his client as previously stated to counsel for defendant, W. J. SMALLEY, to file the within cause of action against the Railroad defendant and that it was considered by counsel for plaintiff that the Florida Statutes clearly provided that the execution of the release would not release any claim against the railroad defendant and said advice was given to the plaintiff, herein, at that time.

Further Affiant saeth not.

/s/ WILLIAM R. HAPNER, JR.

STIPULATION CONCERNING STATEMENTS MADE DURING HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

It is hereby stipulated and agreed between the Plaintiff, through his undersigned attorney and the Third Party Defendants, W. J. Smalley, d/b/a Smalley Transportation Company and Royal Globe Insurance Company, through their undersigned attorneys, that during the hearing on the Motion for Summary Judgment, filed in this cause by the Defendant/Third Party Plaintiff, Seaboard Coast Line Railroad Company, the attorney for the Plaintiff stated to the Trial Judge that it was not the intention of the Plaintiff to release his claim against the Railroad when the Release in issue was executed. Then, when the undersigned attorney for Smalley and Royal Globe was asked about his intention in obtaining the Release, the undersigned attorney stated that it was his intention to obtain a full Release in favor of his clients and he not know who all would be released through Mr. Kentner's execution of the Release in issue.

/s/ W. R. Hapner, Jr.
Attorney for Plaintiff, Aldon Keith Kentner

/s/
Attorney for W. J. Smalley, d/b/a
Smalley Transportation Company,
Smalley Investments, Inc., Royal
Indemnity Company and Royal
Globe Insurance Company

DEFENDANTS' MOTION TO STRIKE AFFIDAVIT AND STIPULATION CONCERNING STATEMENTS MADE DURING HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, Seaboard Coast Line Railroad Company, a corporation, and The Seacoast Transportation Company, a corporation, by their undersigned attorneys hereby move to strike the Affidavit of William R. Hapner, Jr., dated March 6, 1972, and the Stipulation Concerning Statements Made During Hearing on Defendants' Motion for Summary Judgment referred to in the plaintiff's Motion for Rehearing, served herein, upon the following grounds:

1. Neither the said Affidavit nor the said Stipulation are admissible to vary or to attempt to vary the terms and provisions of the written Release of All Claims, dated October 30, 1970, executed and delivered by the plaintiff, Aldon Keith Kentner.

2. Any and all prior negotiations and agreements between the plaintiff, Aldon Keith Kentner, and the defendants, in Suit No. 179833, filed in this court were merged in the final Release of All Claims dated October 30, 1970, executed and delivered by the plaintiff.

3. The terms and provisions of the said Release may not be varied by subsequent parol or written testimony.

4. Neither the said Affidavit nor the Stipulation are admissible in this action for any purpose.

5. The said Affidavit and Stipulation are untimely, and should not be considered by the court after the entry herein of its Final Summary Judgment, dated February 28, 1972.

FOWLER, WHITE, GILLEN, HUMKEY, KINNEY & BOGGS, P.A.
Post Office Box 1438, Tampa, Florida 33601

By: William A. Gillen
William A. Gillen
Attorneys for Defendants

FILED
APR 8 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

WILLIAM A. GILLEN, ESQUIRE of
FOWLER, WHITE, GILLEN, KINNEY,
BOGGS AND VILLAREAL, P.A.
Post Office Box 1438
Tampa, Florida 33601

Counsel for Respondents

Of Counsel:

MORRIS E. WHITE, ESQUIRE
and
EDWARD M. WALLER, JR., ESQUIRE
Post Office Box 1438
Tampa, Florida 33601

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

In this Brief, Petitioner, ALDON KEITH KENTNER, who was Plaintiff in the Circuit Court of the Thirteenth Judicial Circuit of Florida, Appellant in the District Court of Appeal of Florida, Second District, and Petitioner in the Supreme Court of Florida, will be referred to as KENTNER. Respondents SEABOARD COAST LINE RAILROAD COMPANY and the SEACOAST TRANSPORTATION COMPANY, who were co-Defendants in the Circuit Court of the Thirteenth Judicial Circuit of Florida, Appellees in the District Court of Appeal of Florida, Second District, and Respondents in the Supreme Court of Florida, will be referred to collectively as SEABOARD. The following symbols will be used:

(P) Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District filed by KENTNER.

(PA) Appendix to Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District filed by KENTNER.

QUESTIONS PRESENTED

Respondents respectfully submit that the questions presented by KENTNER should be framed as follows:

1. WHETHER THE BROAD GENERAL RELEASE EXECUTED BY KENTNER RELEASING AND DISCHARGING CERTAIN NAMED PERSONS AND "ANY OTHER PERSON, FIRM OR CORPORATION CHARGED OR CHARGEABLE WITH RESPONSIBILITY OR LIABILITY," FROM ALL CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, LOSS OF SERVICES, ACTIONS AND CAUSES OF ACTION, ARISING BY REASON OF A SPECIFIC ACCIDENT EFFECTIVELY RELEASED KENTNER'S CLAIM UNDER FELA AGAINST SEABOARD FOR DAMAGES SUSTAINED IN THE SAME ACCIDENT DESCRIBED IN THE RELEASE.

2. WHETHER THE PAROL EVIDENCE RULE PROTECTS SEABOARD, WHOSE RIGHTS DEPEND ON THE LANGUAGE OF THE RELEASE EXECUTED BY KENTNER AND PREVENTS KENTNER FROM CONTRADICTING THAT LANGUAGE.

STATEMENT OF THE CASE

Petitioner has filed a Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Second District, affirming, per curiam, a Summary Final Judgment for Defendants entered by the Circuit Court of Hillsborough County, Florida, in favor of Respondents.

On November 30, 1967, KENTNER, an employee of Respondents, drove a certain tractor/trailer to a warehouse occupied and operated by W. J. SMALLEY, d/b/a SMALLEY TRANSPORTATION COMPANY (hereinafter SMALLEY), in Tampa, Florida, where the said trailer was to be loaded with certain rolled rugs or carpeting by the agents or employees of SMALLEY. (PA 14) At the same time and place, KENTNER was called upon to assist in the loading of said rugs and, in the process of loading same, a rug was pushed against KENTNER'S leg causing him to fall and resulting in injuries to KENTNER. (PA 10)

In 1969, KENTNER filed a negligence action against SMALLEY and SMALLEY'S insurance carrier, ROYAL INDEMNITY COMPANY, for KENTNER'S injuries resulting from SMALLEY'S negligence. (P 3) On October 30, 1970, in compromise and settlement of KENTNER'S suit against SMALLEY and its insurer, KENTNER executed a "RELEASE OF ALL CLAIMS" which recited payment to KENTNER of $24,000. (PA 11) The "RELEASE OF ALL CLAIMS" provided that in consideration of the $24,000 paid to KENTNER, KENTNER released and forever discharged ROYAL GLOBE INSURANCE COMPANY, SMALLEY TRANSPORTATION COMPANY and W. J. SMALLEY and *any other person, firm or corportion* charged or chargeable with responsibility or liability, their heirs, representatives and assigns from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action arising from the accident on November 30, 1967, at the SMALLEY warehouse. (PA 11) The Release also provided that the payment and settlement in compromise "is made to terminate further controversy respecting *all* claims for damages . . ." (PA 11) (Emphasis added)

Nevertheless, KENTNER filed this suit against SEABOARD, his employer, to recover damages for these injuries suffered in this accident which had occurred at the SMALLEY warehouse on November 30, 1967. (PA 10) In his Amended Complaint in this action, KENTNER alleged that SEABOARD was negligent in failing to provide KENTNER with a safe place to work, in instructing KENTNER to work in an unsafe place, in failing and neglecting to provide KENTNER with proper assistance, and in failing to safeguard KENTNER against injuries. (PA 12) KENTNER'S Amended Complaint alleged that it was an action arising under the FELA. (PA 10)

SEABOARD answered the Complaint filed by KENTNER and set up, among other affirmative defenses, defenses based upon the "RELEASE OF ALL CLAIMS" given by KENTNER in connection with the settlement of his suit against SMALLEY. (PA 13-18, 26-28) SEABOARD also filed a Third Party Complaint against SMALLEY alleging, among other matters, that if SEABOARD was guilty of any negligence, such negligence was secondary or passive and the negligence of SMALLEY was primary or active. (PA 25) Accordingly, SEABOARD sought indemnity against SMALLEY for any sums that might be adjudged against SEABOARD in favor of KENTNER. (PA 25)

SEABOARD then moved for Summary Judgment based upon the pleadings and an admission by KENTNER that the "RELEASE OF ALL CLAIMS" was genuine. (P 5) The trial court granted SEABOARD'S Motion for Summary Judgment on the ground that KENTNER had released SMALLEY and "all other persons, firms and corporations" and that said Release barred KENTNER'S action against SEABOARD. (PA 4)

Thereafter, KENTNER moved for a rehearing and, in connection with said motion, offered an Affidavit of KENTNER'S counsel that, contrary to the language of the "RELEASE OF ALL CLAIMS" releasing SMALLEY and "any other person, firm or corporation", it was not the intention of KENTNER or his counsel to release SEABOARD. (PA 28-29) SEABOARD moved to strike the Affidavit and a Stipulation to the same effect on the grounds that said Affidavit and Stipulation purported to vary and contradict the language of the Release and thus were inadmissible. (PA 31) The trial court, after hearing KENTNER'S Motion for Rehearing and SEABOARD'S Motion to Strike the Affidavit and Stipulation, entered its Order Granting SEABOARD'S Motion to Strike and Denying KENTNER'S Motion for Rehearing. (PA 5-6)

KENTNER then appealed to the District Court of Appeal of Florida, Second District, and that court affirmed, per curiam, the judgment entered by the trial court. (P 7) KENTNER then filed a Petition for Writ of Certiorari in the Supreme Court of Florida and said Petition was denied. (P 8)

ARGUMENT

1. THE BROAD GENERAL RELEASE EXECUTED BY KENTNER RELEASING AND DISCHARGING CERTAIN NAMED PERSONS AND "ANY OTHER PERSON, FIRM OR CORPORATION CHARGED OR CHARGEABLE WITH RESPONSIBILITY OR LIABILITY," FROM ALL CLAIMS, DEMANDS, DAMAGES, COSTS, EXPENSES, LOSS OF SERVICES, ACTIONS AND CAUSES OF ACTION, ARISING BY REASON OF A SPECIFIC ACCIDENT EFFECTIVELY RELEASED KENTNER'S CLAIM UNDER FELA AGAINST SEABOARD FOR DAMAGES SUSTAINED IN THE SAME ACCIDENT DESCRIBED IN THE RELEASE.

KENTNER seeks to invoke the jurisdiction of this Court by asserting that the state court decision here sought to be reviewed is "in direct conflict with this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)." (P 8, 15) In an apparent effort to remold the instant case so that such a conflict might appear to exist, KENTNER states (P 11):

> "In the present case, the trial court and the district court of appeal applied the common law rule that a release of one joint tort feasor was a release of all."

In fact, however, analysis of the "RELEASE OF ALL CLAIMS" executed by KENTNER, the defenses asserted by SEABOARD in the trial court, and the Summary Final Judgment for Defendants entered by the trial court proves conclusively that the state court decision in the instant case does *not* involve application of the common law rule but is based upon the fact that KENT-

NER executed a *general* release rather than a special release. KENTNER'S "RELEASE OF ALL CLAIMS" released not only the parties specifically named therein but also "any other person, firm or corporation." (PA 11) On the contrary, the release in *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* released and discharged only the following parties: "Radio Corporation of America or General Electric Company or Western Electric Company and its subsidiaries and their respective successors and assigns." (401 U.S. at 342, n. 10)

The extended discussion by this Court in *Hazeltine* as to the common law rule and certain modifications thereof was necessary only because the release in that case itself gave no indication whether Zenith intended to release only the named parties or the named parties plus all others. KENTNER'S "RELEASE OF ALL CLAIMS" clearly and unambiguously releases the named parties *and all others.* Accordingly, not only is there no *direct* conflict between the instant state court decision and this Court's decision in *Hazeltine* but there is *no* conflict of any kind whatsoever. In *Layne & Bowler Corporation v. Western Well Works,* 261 U.S. 387 (1923) this Court, in recognition of its "already burdened docket," held that its Writ of Certiorari should be dismissed and recognized that, where conflict is urged as the basis for granting a Writ of Certiorari, the conflict must be "a *real and embarrassing conflict* of opinion and authority." (261 U.S. at 393) While this Court there was discussing an alleged conflict between circuit courts of appeals, the requirement for a "real and embarrassing conflict" should be equally applicable in considering an alleged conflict between state court decisions on federal questions and a decision of this Court.

KENTNER relies upon 28 U.S.C. §1257(3) to establish jurisdiction in this Court. Presumably KENTNER would contend that the instant case is one in which rights are "specially set up or claimed under the . . . statutes of . . . the United States." KENTNER, in his Petition, also discusses the construction of the FELA and its "humanitarian and remedial purposes." (P 8-9) Of course, the instant case does not involve construction of the FELA or its application but is concerned solely with federal case law as to the effect of KENTNER'S "RELEASE OF ALL CLAIMS".

The *only* federal appellate decision involving a general release under FELA is that of *Panichella v. Pennsylvania Railroad Company,* 268 F.2d 72 (3d Cir. 1959), cert. denied 361 U.S. 932, 80 S.Ct. 370, 4 L.Ed.2d 353 (1960). In that case, a railroad company directed its employee to go to a resturant, eat breakfast and bring back lunch for himself and another employee. While en route to the restaurant, the employee slipped and fell on an icy sidewalk abutting the property of Warner Brothers Pictures, Incorporated. The injured employee, by his attorney, made a claim against Warner and negotiated a settlement thereof with the Traveler's Insurance Company, the liability insurance carrier for Warner. In connection with the settlement, for a valuable consideration, the injured employee executed and delivered a written release which released "Warner Brothers Pictures, Incorporated . . . *and all other persons, firms and corporations* of and from any and all claims, demands, rights and causes of action of whatsoever kind and nature," arising from the accident. (268 F.2d at 74) (emphasis supplied)

The railroad paid none of the consideration for the release, was not a party to it and in fact was not aware of the settlement until several days after the release

had been delivered. After consummating the settlement, the plaintiff instituted a suit against the railroad company. The trial court entered judgment for the employee. The Third Circuit reversed and held that the release barred the employee's claim under FELA against the railroad. The form of release in *Panichella, supra,* is almost identical in pertinent language to the release in the instant case. Just as the release executed by Panichella was a general release, the release executed by KENTNER was a general release. On the contrary, the federal decisions relied upon by KENTNER in his Petition, that is, *Hazeltine* and *Cates v. United States,* 451 F.2d 411 (5th Cir. 1971), involved special releases, which were expressly limited in their operation to certain described parties.[1]

Aside from the *Panichella* decision which is squarely in point, there are numerous non-FELA decisions holding that a general release, as executed by KENTNER, releases *all* persons. In *Morrison v. General Motors Corporation,* 428 F.2d 952 (5th Cir. 1970), the Fifth Circuit upheld the validity of a general release and recognized that language releasing "all other persons, firms or corporations" satisfies the requirement of the Uniform Joint Tort Feasor's Act, to-wit, that a release does not discharge other tort feasors "unless the release so provides." The Fifth Circuit noted that "all" means "all" without requiring the insertion of the names of any and all other persons. (428 F.2d at 953) *See also* the decisions by Chief Judge Hammond in *Peters v.*

[1] KENTNER also cites a decision by the Supreme Court of Alaska, *Young v. State,* 455 P.2d 889 (Alaska 1969) which involves only questions of Alaska State law and *Wiederhold v. Elgin, Joliet and Eastern Railway Company,* 368 F.Supp. 1054 (N.D. Ind. 1974), a trial court decision which, we submit, is erroneous in that it fails to distinguish between a general release and a special release.

Butler, 251 A.2d 600 (Md. 1969) and *Pemrock, Inc. v. Essco Co., Inc.*, 249 A.2d 711 (Md. 1969) and see *Hasselrode v. Gnagey*, 172 A.2d 764 (Pa. 1961); *Oxford Commercial Corporation v. Landau*, 190 N.E.2d 230 (N.Y. 1963); *Poston v. General Motors Corporation*, 465 S.W. 2d 841 (Tex. App. 1971); *Dorenzo v. General Motors Corporation*, 334 F.Supp. 1155 (E.D. Pa. 1971)

Thus, whether in an FELA context or not, a general release is a general release and operates as such. Of course, in the instant case, if SMALLEY had not obtained a general release which also released SEABOARD, SEABOARD'S Third Party suit against SMALLEY for indemnity could have increased SMALLEY'S liability for KENTNER'S injuries regardless of SMALLEY'S settlement with KENTNER.[2] Since the Release executed by KENTNER was a general release, the Release bars KENTNER'S action against SEABOARD and, consequently, SEABOARD'S claim for indemnity against SMALLEY need not be enforced.

2. THE PAROL EVIDENCE RULE PROTECTS SEABOARD, WHOSE RIGHTS DEPEND ON THE LANGUAGE OF THE RELEASE EXECUTED BY KENTNER, AND PREVENTS KENTNER FROM CONTRADICTING THAT LANGUAGE.

On the basis of a footnote in the *Hazeltine* case, KENTNER argues that the decision of the state court in the instant case applying the parol evidence rule is "in direct conflict" with this Court's holding in *Hazeltine*. This Court in *Hazeltine* held that evidence of the intention of the parties was admissible to determine whether the parties to the release intended to release Hazeltine Research, Inc., which was not a party to the

[2] *Cf.* the discussion by Judge Tuttle in *Morrison v. General Motors Corporation*, 428 F.2d 952, 954 (5th Cir. 1970).

release. As we have demonstrated hereinabove, the release in *Hazeltine* did not purport to release any persons other than those named specifically. Under these circumstances, evidence of the parties' intention as to a person not specifically named was perfectly consistent with the language of the release and was not an attempt to vary that language. Since there was no reference, either specifically or generally, to HRI in the release, HRI acquired no rights under that release. On the contrary, in the instant case, SEABOARD did acquire rights under the Release executed by KENTNER and, further, the evidence of intention offered by KENTNER plainly contradicts the clear and unambiguous language of the Release and is an attempt to vary that language.

Although the parol evidence rule may not have been applicable to HRI under the circumstances of the *Hazeltine* case and the language of that Release, the rule does apply when an instrument is executed as the final embodiment of an agreement and becomes the act of the parties and where the parol evidence is offered to vary the legal effect of its terms. Under such circumstances, the rule operates to protect all whose rights depend upon the instrument even though not parties to it. *Pugh v. Commissioner of Internal Revenue,* 49 F.2d 76, 79 (5th Cir. 1931), *cert. denied sub. nom., Pugh v. Burnet,* 284 U.S. 642, 52 S.Ct. 22, 76 L.Ed. 546 (1931). *See also Jurs v. Commissioner of Internal Revenue,* 147 F.2d 805 (9th Cir. 1945); *Commissioner of Internal Revenue v. Dwight's Estate,* 205 F.2d 298 (2d Cir. 1953), *cert. denied,* 346 U.S. 871, 74 S.Ct. 121, 98 L.Ed. 380 (1953); *Great American Ins. Co. N.Y. v. Gulf Marine Drilling No. 1,* 302 F.2d 332 (5th Cir. 1962); *Clark v. United States,* 341 F.2d 691 (9th Cir. 1965) Persons whose rights depend upon a release are not "strangers" to the instrument. *Cornellier v. Hinsdale Raceway, Inc.,* 248 A.2d 91 (N.H. 1968).

The Release executed by KENTNER is an integrated written release and the clear and unambiguous terms thereof cannot be varied by parol evidence. *See Annotation, Applicability of Parol Evidence Rule in Favor Of or Against One Not a Party to Contract of Release,* 13 ALR3d 313, 318-319 (1967) Accordingly, the decision of the state court excluding the evidence offered by KENTNER to contradict the terms of the release was a correct application of the parol evidence rule and the decision does not conflict with the decision of this Court in *Hazeltine.*

CONCLUSION

Petitioner seeks a third review of the state trial court's decision in this case by claiming conflict with a decision which is clearly consistent with, rather than contrary to, the trial court decision. The issue in the instant case, the effect of a general release, arises only coincidentally in the FELA context and, in the absence of any conflict, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

William A. Gillen

WILLIAM A. GILLEN, Esquire of
FOWLER, WHITE, GILLEN, KINNEY,
BOGGS AND VILLAREAL, P.A.
Post Office Box 1438
Tampa, Florida 33601

Counsel for Respondents

Of Counsel:

MORRIS E. WHITE, Esquire
AND
EDWARD M. WALLER, JR., Esquire
Post Office Box 1438
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District, have been sent by mail this 6th day of April, 1974 to Marvin E. Barkin, Esquire and Fred W. Pope, Jr., Esquire of Trenam, Simmons, Kemker, Scharf & Barkin, Post Office Box 1102, Tampa, Florida 33601, Attorneys for Petitioner, Aldon Keith Kentner.

William A. Gillen

Attorney

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY
and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

PETITIONER'S SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

MARVIN E. BARKIN
FRED W. POPE, JR.
TRENAM, SIMMONS, KEMKER,
SCHARF & BARKIN
P. O. Box 1102
Tampa, Florida 33601

Attorneys for Petitioner,
ALDON KEITH KENTNER

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INTRODUCTION

The Petitioner, ALDON KEITH KENTNER, docketed his Petition for a Writ of Certiorari in this Court on March 11, 1974. The case of *Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974) first appeared in the West Publishing Company Federal Supplement advance sheet dated March 18, 1974, and was not available to petitioner when his petition was filed. Accordingly, pursuant to the provisions of Rule 24(4) and (5), Supreme Court Rules, petitioner files this supplemental brief to call the attention of this Court to the *Wiederhold* decision, and combines in this brief his Reply to respondents' brief served on April 6, 1974.

The following reference symbols will be used:

(R) Brief of Respondents in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Second District.

(PA) Appendix to Petition by Aldon Keith Kentner for a Writ of Certiorari to the District Court of Florida, Second District.

SUPPLEMENTAL ARGUMENT

Wiederhold is based upon facts remarkably similar to the facts of the present case, and decides the identical issues of law presented to this Court by petitioner. *Wiederhold* correctly holds that the doctrine of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 341 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), that a party releases only those he intends to release, applies with full force to actions brought under the Federal Employers' Liability Act [hereinafter "FELA"] and that a railroad may not set up as a defense to a FELA action a release given to a third-party where the railroad is not named in the release, is not a party to the settlement, and is not intended to be benefited by the release.

In *Wiederhold*, the plaintiff was an automobile driver and chauffeur for the defendant railroad. While plaintiff was driving an automobile on behalf of the railroad, a third-party improperly turned in front of the plaintiff, who was unable to stop and was injured in the resulting accident. Plaintiff sued the third-party tortfeasor for negligence, and sued the railroad under the FELA. Plaintiff also filed a state workmen's compensation claim against the railroad, but the claim was dismissed because the FELA remedy is exclusive.

Plaintiff, upon the advice of an attorney, settled his action against the third-party driver and signed a release in favor of said third-party. The railroad was not a party to the action against the third-party driver, was not a party to that

settlement, was not named in the release, and was not intended to be benefited by the release. As in the present case, the railroad in *Wiederhold* attempted to utilize the release given to the third-party as an absolute defense to the plaintiff's FELA claim against the railroad. The railroad moved to dismiss, and since extrinsic matters were presented and accepted by the court, the court treated the motion as one for summary judgment and denied it. In the present case, virtually the same procedure was followed by the Florida court, except that summary judgment was entered in favor of the Respondent Railroad, which thereby received the full benefit of a release given to a third-party.

The release given by *Wiederhold* to the third-party tortfeasor purported to release the third-party tortfeasor and "all other persons, firms or corporations liable or who might be claimed to be liable." (368 F. Supp. at 1060) In the present case, the release purported to release the third-party tortfeasor and "any other person, firm, or corporation charged or chargeable with responsibility or liability, . . ." (*See* PA-11). Comparison reveals the amazing similarity of the release language in the two cases.

In both the present case and in *Wiederhold*, the plaintiff executed the release in favor of the third-party on advice of counsel. Both cases thus illustrate the serious trap for FELA plaintiffs and their lawyers in situations in which settlement with a third-party tortfeasor is achieved and a release given prior to completion of the FELA action. The *Wiederhold* court correctly recognized that this pitfall can be avoided and uniformity achieved in FELA actions only by the application of the doctrine of *Zenith v. Hazeltine, supra*.

The court's reasoning in *Wiederhold* is noteworthy. Citing the decisions in *Panichella v. Pennsylvania r.r. co.*, 167 F. Supp. (W.D. Pa. 1958) *rev'd* 268 F.2d 72 (3d Cir. 1959) *cert. den.* 361 U.S. 932, 80 S.CT. 370, 4 L.Ed. 2d 353 (1960), and *Falco v. Pennsylvania R.R.*, 202 Misc. 769, 109 N.Y.S.2d 279

(1951), the court acknowledged that both of those FELA cases hold that a release of one joint tortfeasor released the railroad a well. Questioning the continued validity of those decisions, the court reasoned (368 F. Supp. at 1057):

> Although the *Falco* and *Panichella* decisions support the defendant's position, the continued vitality of these decisions is placed in doubt by recent decisions and attacks on the common law rule that release of one joint tortfeasor releases other joint tortfeasors.
>
> * * *
>
> Several reasons exist why federal law in this area should accommodate state law. In FELA actions federal law is applied in order to insure a uniform application in all states. It would be anomalous for the federal law on releases to conflict with the state laws. Since most states no longer adhere to the common law of releases, it could create confusion for the law of releases to be different depending on whether the action against the party released was based on state or federal law. Under such circumstances it would be possible to settle the FELA claim and still preserve an action against another joint tortfeasor if based on state law, but it would not be possible to settle the state law claim and still proceed with an FELA action.
>
> Another problem arises because many standard release forms will be printed to conform to state law. Both attorneys and parties may resort to such forms for FELA cases only to find that they have released tortfeasors they did not intend to release. Since the state rule would be less harsh than the federal rule on the effect of releases, a party may fall into a trap by signing a release which would not release all tortfeasors in actions based on state law, but would release all tortfeasors in causes of action founded on federal law. For these reasons the *Falco* and *Panichella* holdings should be re-examined.

The District Court then re-examined the *Falco* and *Panichella* holdings in light of this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 341, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), and concluded (368 F.Supp. at 1059):

Although the *Zenith Radio* case adopted the intent rule only for antitrust cases, the broad language of the court indicates that the common law rule is not applicable to statutory causes of action created under federal law such as FELA actions. It is also clear that compelling reasons exist for adopting a rule focusing on the intent of the parties in FELA actions. The statute by requiring the application of federal law strives for uniform results. Currently among the states various rules regarding releases are applied. To adopt a restrictive federal rule regarding releases, such as the common law rule, would mean that most releases which would preserve a right of action against other tortfeasors under state law would not preserve such rights if used in a FELA action. If the broader intent rule is applied, the many variations of release law among the states can be accommodated by the federal law, since in each case it is a factual question whether the plaintiff intended to release all or just some tortfeasors. Thus, if under state law a right to proceed against other tortfeasors is only preserved if expressly stated in the release, a party executing such a release in compliance with state law would not lose his right of action under the FELA, as his intent to preserve his action would clearly be shown. If state law focused on intent, then it also would be accommodated by federal law. Similarly, if a state provided that a covenant not to sue could be used in place of a release in order to safeguard the right to proceed against a joint tortfeasor, the use of such a covenant would be evidence of an intent not to release all tortfeasors under federal law. By applying the intent rule in federal actions, a party could properly preserve his right of action under state law and still be safeguarded under the federal law. The intent rule best minimizes potential conflicts in the federal system.

The court's reasoning is sound, logical and persuasive. Releases play a vital role in the administration of the FELA and in the achievement of its humanitarian and remedial purposes. The present case presents this Court with a unique opportunity to avoid confusion by resolving the question of whether courts deciding FELA cases are to be guided by the older reasoning enunciated in *Falco* and *Panichella*, *supra*, or are to adopt and apply the rationale of *Wiederhold* that the "intent" rule of *Zenith v. Hazeltine* applies with full force in all FELA actions.

REPLY ARGUMENT

INTRODUCTION

Pursuant to Rule 24(4), Supreme Court Rules, petitioner replies to the arguments first raised by respondents' brief in opposition to Petition for Certiorari.

ARGUMENT

1. *Respondents argue that there is no conflict with* Zenith Radio Corp. v. Hazeltine Research, Inc., *401 U.S. 321 (1971) because* Zenith *involved a "special" release and this case involves a "general" release.*

Since the decision in *Zenith v. Hazeltine, supra*, it is settled federal law that:

> [A] party releases only those other parties whom he intends to release. (401 U.S. at 347)

Zenith does not distinguish between so called "special" and "general" releases. In deciding *Zenith*, this Court relied upon and approved *Young v. State*, 455 P.2d 889 (Alaska 1969), which involved a "general" release and which is squarely against the Railroad. In *Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974), the United States District Court correctly applied the *Zenith* Rule to a "general" release, the language of which is almost identical to the present release. Respondents' brief completely fails to cope with these two decisions, other than to create a spurious distinction between "special" and "general" releases, and respondents attempt to brush these cases aside on the basis that *Young v. State* "involves only questions of Alaska State Law" and that *Wiederhold* "is erroneous in that it fails to distinguish between a general release and a special release." (R. 9 n. 1)

The respondents' brief dramatically illustrates the developing conflict among federal courts[1] and between federal courts and state courts[2]. The District Court's decision in *Wiederhold, supra*, is clearly right, but right or wrong, this Court should grant its Writ of Certiorari to resolve the growing body of conflict in this important area of law.

2. *Respondents question the jurisdiction of this Court because "the instant case does not involve construction of the FELA or its application but is concerned solely with federal case law . . . ."*

Respondents' half-hearted questioning of this Court's jurisdiction is fully refuted by *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), which involved the validity of a release in a FELA action. The *Dice* case was reviewed by this Court on a Writ of Certiorari to the Supreme Court of Ohio. This Court stated that Certiorari was granted "because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act."

---

1. *Compare Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Sup. 1054 (N.D. Ind. 1974) *with Panichella v. Pennsylvania R.R. Co.*, 268 F.2d 72 (3d Cir. 1959) *cert. den.* 361 U.S. 392, 80 S.Ct. 370, 4 L.Ed. 2d 353 (1960).

2. *Compare Kentner v. Seaboard Coastline R.R. Co.*, 278 So.2d 637 (2d D.C.A. Fla. 1973 *cert. den.* 285 So.2d 614 (Fla. 1973) *with Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974). The Florida Supreme Court's refusal to review this case was a 4-3 split decision.

In *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 426, 87 L.Ed. 239 (1942), the plaintiff brought an action in a Pennsylvania State Court for maintenance and cure and for damages under the Jones' Act. The issue was whether a release given by the plaintiff was obtained by fraud and misrepresentation. The Pennsylvania court ruled that the more stringent Pennsylvania burden of proof would apply and granted the defendant a judgment n.o.v. The Pennsylvania Supreme Court affirmed because the Pennsylvania rule as to burden of proof on releases did not affect the "substantive rights" of the parties, was merely "procedural" and was therefore governed by state law. This Court granted its Writ of Certiorari because "the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under §237(b) of the Judicial Code 28 USCA §344(b)." [Presently codified as 28 U.S.C. §1257].

In both *Dice* and *Garrett* this Court granted certiorari where state decisions conflicted not directly with the language of the federal statute, but with this Court's decisions setting forth policies to be followed under the federal statutory schemes involved. The release in the present case had a dramatic effect upon petitioner's substantive federal rights under the FELA. Respondents' jurisdictional aside (R. 8) is without foundation.

3. *Respondents argue that they properly invoked the Parol Evidence Rule because their rights "depend upon" the release.*

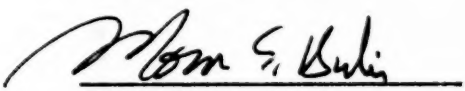
Respondents rely principally on certain decisions of inferior federal courts in *tax cases* decided prior to *Zenith* (R. 11). Respondents fail to cite a single federal case holding that the Parol Evidence Rule is applicable in favor of a stranger to a *release*. Tax cases obviously are not applicable because they involve the right of the United States to prevent a taxpayer from disputing his own written contract. The United States does not claim under those contracts.

The Railroad also relies upon a New Hampshire State Court decision, *Cornellier v. Hinsdale Raceway, Inc.*, 248 A.2d 91 (N.H. 1968). That case involved an automobile accident governed by the laws of the State of New Hampshire. The New Hampshire Supreme Court refused to permit the introduction of parol evidence where a release purported to release an individual and "any and all other persons, firms and corporations . . . ." Reliance upon *Cornellier* simply illustrates the patent conflicts between *Cornellier* and the present case on one hand, and *Zenith* and *Wiederhold*, *supra*, on the other. The railroad in *Wiederhold* contended that plaintiff could not offer proof to counter the express language of the release, but the District Court, correctly interpreting the principles enunicated in *Zenith*, denied the railroad's motion for summary judgment and indicated an intention to receive parol evidence on the issue of the intent of the release. Respondents' brief well illustrates the serious conflicts developing in both the federal and state systems on this point, and this case presents a perfect opportunity for resolution of the emerging conflicts in this very important area of federal law.

CONCLUSION

For the reasons originally set forth in the petition herein, as fully supported by the District Court's decision in *Wiederhold v. Elgin, Joliet and Eastern Ry. Co.*, 368 F. Supp. 1054 (N.D. Ind. 1974), the Court should issue its Writ of Certiorari to review the opinion of the District Court of Appeal of Florida, Second District.

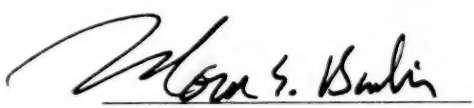
Respectfully submitted,



MARVIN E. BARKIN
FRED W. POPE, JR.
TRENAM, SIMMONS, KEMKER,
SCHARF & BARKIN
P. O. Box 1102
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Supplemental and Reply Brief in Support of Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Second District, have been sent by mail this 12 day of April, 1974, to William A. Gillen, Esquire, of Fowler, White, Gillen, Kinney, Boggs and Villareal, P.A., Post Office Box 1438, Tampa, Florida 33601, Attorneys for Respondents, Seaboard Coast Line Railroad Company and the Seacoast Transportation Company.



Attorney